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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

NO. 814

EILEEN MORAN, Administratrix of the Estate of Patrick J. Moran, Deceased, Respondent,

v.

PITTSBURGH-DES MOINES STEEL COMPANY, a Copartnership, JOHN E. JACKSON, and PITTSBURGH-DES MOINES COMPANY, a Corporation, Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Pittsburgh-Des Moines Steel Company, a copartnership, John E. Jackson and Pittsburgh-Des Moines Company, a corporation, pray that a writ of certiorari be issued to review the judgment entered in this case on February 26, 1948, by the United States Circuit Court of Appeals for the Third Circuit.

The judgment reversed the judgment of the District Court of the United States for the Western District of Pennsylvania and remanded the cause.

The judgment of the District Court was involuntary dismissal at the close of the plaintiff's evidence under Rule 41(b), on the ground that upon the facts and the law the plaintiff had shown no right to relief.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (by Goodrich, C.J.) is reported in 166 F. (2d) 908, and appears in the Appendix at page 713.

There was no written opinion by the District Court.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended (USCA Title 28, Section 347).

The judgment of the Third Circuit Court of Appeals was entered February 26, 1948.

This application is being presented May 21, 1948.

QUESTIONS PRESENTED.

Preliminary Statement.

This is a negligence suit based on diversity of citizenship requiring the Federal courts to apply the substantive law of Ohio, where the accident happened, and the procedural law of Pennsylvania, where the case was tried.

It was the first to be tried of seventy-eight similar cases against the same defendants demanding damages of $6,085,000.

In 1940 there was a disastrous explosion and fire at the Cleveland plant of the East Ohio Gas Company. Legal representatives of employees who were killed and a few employees who were injured brought suit in Penn-

sylvania against a subcontractor (the defendants) which constructed gas tanks for the plant and turned the completed job over to the Gas Company thirteen months before the accident. The cause of the accident remains unknown, the evidence disclosing various possible causes.

Question 1.

Does the decision of the Third Circuit Court of Appeals violate the Rules of Decision Act† as applied in *Erie R. Co. v. Tompkins**:—

a. In failing to follow the Ohio decisions terminating the liability of a contractor erecting structures upon the land of another upon completion of the work?

b. And in applying instead, for the first time, Section 385 of the Restatement of Torts, which extends to contractors the principles of *MacPherson v. Buick Motor Co.,*** relating to the liability of suppliers of chattels?

Question 2.

Does the decision fail to apply to the facts of the case the Pennsylvania rule on sufficiency of evidence, that where all the evidence is circumstantial and a number of possible causes of the accident appear, the plaintiff has the burden of "individuating" the cause attrib-

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† Judiciary Act of [Sept. 24] 1789, § 34, Rev Stat § 721, 28 USCA § 725, 8 FCA title 28, § 725.

* *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188 (1938).

** *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696 (1916).

utable to the defendant and of excluding other equally probable causes reasonably disclosed by the evidence?

Question 3.

Where the Circuit Court of Appeals can find no "clear harmonized pattern" in the Pennsylvania cases on sufficiency of evidence but nevertheless applies its own interpretation in reversal of the District Court, should a retrial be postponed until the Pennsylvania Supreme Court decides the law on the point in a sister case already tried?*

Question 4.

On principles of *stare decisis* should a Federal court change the course of substantive law in Ohio in litigation of the magnitude of this in which the defendant contractor confronts a series of seventy-eight similar cases?

Question 5.

Should a writ of certiorari be granted where a retrial will not present more clearly the ultimate legal questions involved?

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* *Foley v. Pittsburgh-Des Moines Steel Co., et al.*, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 638 January Term, 1946, tried February 16, 1948, to March 23, 1948, now awaiting argument on defendants' motions for judgment notwithstanding the verdict and for new trial.

STATEMENT OF MATTER INVOLVED.

This case arises out of a disastrous explosion and fire in the liquefied natural gas plant of East Ohio Gas Company in Cleveland on October 20, 1944. Many lives were lost and the plant was destroyed. This particular case is the first to be tried of seventy-eight similar negligence actions against the same defendants in which the damages demanded aggregate $6,085,000.

The suit is not against the Gas Company which was in exclusive control and operation of the gas works but against a subcontractor which had built storage tanks for the owner, the last one having been accepted thirteen months before the accident.

All of these suits are on behalf of employees of the Gas Company, sixty-six being by legal representatives of deceased employees and the remaining twelve by employees who survived. The complaints allege numerous common counts of negligence relating to design of the tanks, choice of materials and construction. How the accident happened is not explained.

Half of the plaintiffs are represented by counsel for the plaintiff in the present Moran case. The remaining half are represented by Pittsburgh counsel, who filed suit not only in the District Court of the United States, but concurrently in the Court of Common Pleas of Allegheny County, Pennsylvania. These Pittsburgh attorneys appeared as *amici curiae* before the Third Circuit Court of Appeals, and participated in the argument of this Moran case. Pittsburgh counsel tried their first case (*Foley v. Pittsburgh-Des Moines, supra*) in the Court of Common Pleas of Allegheny County, Pennsylvania. After a six-week trial, during which this Moran decision came

down from the Circuit Court of Appeals, the case was submitted to the jury, which found a verdict of $50,000 for the plaintiff widow. Motions for judgment notwithstanding the verdict and for new trial are awaiting argument. Without doubt the losing party will appeal to the Supreme Court of Pennsylvania.

This petition for writ of certiorari arises from the fact that the accident was in Ohio but that the actions lie in the Federal court in Pennsylvania. The substantive law of Ohio is applicable with respect to the duty to third parties of a contractor who erects a structure on the land of another. The procedural law of Pennsylvania is applicable with respect to the burden of proof and the sufficiency of the evidence. This petition asserts that the Third Circuit Court of Appeals has departed from the law of both States. As to Ohio it goes so far as to ignore settled law and blazes a new trail by applying the principles of *MacPherson v. Buick Motor Co.* to a contractor who erects a structure on the land of another and surrenders it to the owner after test.

The case was tried for five weeks before Judge Wallace S. Gourley and a jury in the District Court of the United States for the Western District of Pennsylvania. At the close of plaintiff's case the Court gave judgment of involuntary dismissal under Rule 41 on the ground that there was insufficient evidence of negligence and proximate cause to submit to the jury; plaintiff did not meet the burden of proof (App. 253 a). No opinion was written.

The plaintiff appealed to the Third Circuit Court of Appeals and argument was had on January 21, 1948, before Judges Maris, Goodrich and O'Connell. On February 26, 1948, a decision came down reversing the judg-

ment of the District Court and remanding the cause for further proceedings not inconsistent with the opinion of Goodrich, C.J.

In brief, the testimony disclosed the following:

The plaintiff is a resident of Cleveland. Her husband, an employee of East Ohio Gas Company, died in the disaster of October 20, 1944. The defendants are Pittsburgh-Des Moines Company, a corporation, which fabricated steel at a plant in Pittsburgh; Pittsburgh-Des Moines Steel Company, a partnership, which erected tanks and other steel structures throughout the country; and John E. Jackson, one of the partners.

East Ohio Gas Company, which serves Cleveland with natural gas, determined to erect a plant for the purpose of liquefying, storing and regasifying natural gas. The liquefaction process reduces 600 units of gas to one unit of liquid, thus permitting storage with economy of space. The process requires the compression of gas to 600 pounds per square inch and then its refrigeration to about 250° below zero Fahrenheit, at which point the gas is in liquid form with a vapor pressure of only 2½ pounds per square inch (596 a). Its weight is 42% that of water and its heat content is less than that of an equal amount of gasoline; it is not inflammable or explosive until vaporized by heating (627 a, 596 a).

East Ohio Gas Company was advised in the plant project by an eminent gas engineer as its technical consultant. He had conducted experimental work in liquefying gas and had built a pilot plant in West Virginia (40 a *et seq.*, 589 a, 598 a-602 a). The Gas Company made a general contract with Gas Machinery Company of Cleveland to erect a three-acre plant, which eventually cost some $2,000,000 (43 a; 424 a). The plant consisted

of extensive compressing and refrigerating mechanisms for liquefying gas, of storage tanks for holding the liquid until needed and of devices for regasifying the liquid as needed. The general contractor worked mainly through subcontractors, among whom was the defendant partnership, which contracted to erect the storage tanks. The defendants had nothing to do with the construction of the plant as a whole or the liquefaction and regasification devices but only the empty shells of the tanks (545 a, 548 a). These were huge structures, made of steel plates erected on heavy concrete foundations and welded at the site. Three of them were spheres; and #4 was a cylinder 70 feet in diameter and 43 feet in height.

Through its technical consultant the Gas Company participated in the design of the tanks (50 a, 598 a), selected the type of steel (42 a, 603 a) accepted the drawings and specifications, observed and inspected during construction and participated in tests before acceptance (598 a, 623 a). Its technical staff of engineers was in constant attendance, observing and inspecting the entire course of construction, and its consultant was kept fully informed 556 a, 589 a. The Gas Company secured all the necessary building permits (417 a). Tests of steel for the cylinder showed results equivalent to the tests for the steel in the spheres which had been ordered by the Gas Company (483 a, 484 a, 684 a). For the cylinder the Gas Company secured an independent test of the steel (653 a). The general contractor and the Gas Company participated in selecting and ordering various materials (683 a). During construction of the cylinder, various changes were made at the request of the Gas Company (417 a, 418 a, 523 a), which did some of the work on the tank itself.

In being tested the tanks were subjected to a greater weight of contents and a greater vapor pressure than they would be required to meet in regular commercial use, and were found leakproof. An independent crew of Gas Company workmen conducted a satisfactory leak test of the cylinder (437 a-442 a, 516 a, 535 a, 537 a, 527 a, 565 a). The tanks met plans and specifications. They were accepted and paid for and thereupon operated and controlled exclusively by the Gas Company in its commercial operations. The plant and three of the tanks were put into operation in February, 1941, and were used for 3¾ years before the accident. The fourth tank was accepted by the Gas Company, put into commercial use on September 24, 1943, and was operated successfully for 13 months before the disaster. The Gas Company was in exclusive possession, operation and control of the tanks and the plant, and the defendants had nothing to do with the operation (523 a, 524 a). It had no continuing contract for maintenance, and no right of entry (685 a). The three spheres cost $173,140, and the cylinder $200,000 (424 a). After its acceptance it was never empty and was filled to maximum capacity at least six times.

During this 13-month period the Gas Company made a number of changes about the tanks and the plant which altered the conditions and the risks which existed when the subcontractor's work on the tank had been completed. It constructed curtain walls and dikes around the base of the tanks, cutting off the circulation of air and constituting closed chambers (431 a, 692 a). An electric air blower was then put in to prevent the formation of ice under the fourth tank (515 a, 488 a). Underground conduits were run from the space thus en-

closed to a covered overflow sump which the Gas Company installed (431 a, 524 a). Texas gas with higher nitrogen content than the contractor was informed would be used was introduced into the plant and the Gas Company worked on new nitrogen removal devices (420 a, 514 a, 460 a, 461a). Additional insulation was filled into the tanks from time to time (521 a).

The Gas Company made constant repairs and replacements about the plant in 1943 and 1944, reinforcing foundations (412 a), changing check valves (412 a), repairing a corroded rupture disk on an ethylene tank (487 a), buying new ethylene to replace loss through leakage (512 a), replacing valves on compressors (431 a), repairing a leak on piping leading to the spheres (486 a), putting fresh insulation on the "ice box" in the liquefaction plant (512 a), repairing stuffing boxes (462 a), cleaning out piping and machinery which became "gummed up" with impurities (432 a, 433 a, 490 a, 499 a) and thawing out frozen valves.

Events of October 20, 1944.

In October the Gas Company undertook to fill all four tanks to the full for winter use and at 2:00 P.M. on October 20, the filling being completed, decided to "top off" and shut down the operation. The operation was complex and required great care since the process was so delicately balanced that if one phase of the operation were improperly managed the entire operation would go awry (445 a, 487 a, 504 a, 531 a). The testimony as to manipulation of the many valves is confused (440 a *et seq.*, 506 a *et seq.*). When the shutdown was almost completed at about 2:40 P.M., from causes not known an explosion occurred in the plant. A rumble like distant

thunder was heard, white vapor was seen, fires broke out, two of the tanks were ruptured and most of the plant was burned and destroyed (146 a, 404 a, 405 a, 528 a, 529 a, 407 a, 408 a-410 a). The cylindrical tank exploded with such violence that both inner and outer shells were shattered into some 2,000 counted fragments which were scattered as far as 300 feet from the site of the tank (678 a).

Of the thirteen men engaged in the shutting down operation, only two operators survived. Approximately 130 persons, most of them employees, were killed.

Following the accident, tanks 1 and 2 were found intact but the plug valves were found open and were closed (677 a, 702 a). The concrete curtain walls about tanks 1 and 2 were found shattered with evidence of explosion under the tanks. The steel cover of the overflow pit was blown apart and likewise the ammonia tank in the liquefaction plant and various couplings in the labyrinth of piping around the plant (679 a). Holes were found in various pipes (469 a).

No witness attempted to state how the accident happened or what caused it. The Plant Superintendent stated he did not know the cause. An investigating committee of scientific men appointed by the Mayor of Cleveland to determine the cause of the disaster, after conducting an extensive investigation reported that it could not determine the exact cause of the disaster (476 a, 467 a-469 a, 472 a-477 a).

The chairman of the committee could not state whether the tank ruptured due to structural weakness or to an external condition or to operations in the general plant system. He was certain that there was a vio-

lent rupture of the tank, whereas the tank was built to contain a maximum vapor pressure of five pounds (93 a, 94 a). Another scientist on the committee testified that the committee could not find any one reason which even might have caused the accident but thought the rupture was caused by an impact of some kind (476 a, 477 a).

Defendant's chief engineer, called by the plaintiff, testified as to various possible causes of the accident in faulty operation of the liquefaction plant (678 a, 683 a). He testified that the set-off may have been an explosion anywhere in the plant communicated to the enclosed space under #4 tank; that excess pressure may have got into the tank through a leaky valve or partially open valve; or that a failure in the vent piping system may have released the pressure on top of the tank causing a bump of liquid.

In plaintiff's case at least nine possible causes of the accident appeared for which defendants could not be responsible:

Improper dropping of safety-relief valve on top of No. 4 (98 a, 472 a).

Improper manipulation among the numerous valves, allowing excess gas or liquid to enter the tanks (93 a-94 a, 442 a-460 a, 465 a, 502 a-512 a, 530 a-533 a).

Failure of a valve through leaking or sticking (412 a, 431 a-432 a, 463 a, 486 a, 488 a, 517 a, 531 a, 680 a).

Failure of piping or equipment in the liquefaction or degasification process, through freezing, defect, corrosion, or wear and tear (417 a, 431 a-432 a,

445 a, 454 a, 462 a, 488 a, 512 a, 517 a, 531 a, 667 a, Exs. OO, PP, QQ.)

Explosion of gas, ammonia or ethylene from leaks in the plant, communicated through duct to space beneath No. 4 (498 a, 512a, 526 a, 680 a).

Failure to remove excess moisture or nitrogen from the natural gas (408 a, 499 a-501 a, 514 a, 680 a).

Failure in the vent piping system so as to release 2½ pound pressure in No. 4 and allow bumping of roof (452 a-453 a, 704 a-705 a).

Lack of proper coordination in timing the various complicated moves necessary to shut down filling operations (445 a, 487 a, 504 a, 507 a-508 a, 530 a, 531 a).

Omission of pressure relief device between expansion valve and tanks, permitting surge of pressure causing a bump (95 a).

The testimony did not attempt to eliminate or exclude these possible causes reasonably suggested by the evidence.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision violates the Rules of Decision Act in refusing to follow the substantive law of Ohio:—

1. The decision rejects the substantive law of Ohio —by ignoring it—that when a contractor installs work on the land of another and surrenders it to the owner, the contractor's liability to third persons by reason of the condition of the work is terminated.

Bailey v. N. W. Ohio Natural Gas Co., 4 O.C.C. 471, Circ. Ct. Lucas County, affirmed without opinion by the Ohio Supreme Ct., 52 O.S. 623, 44 N.E. 1130 (1894).

Strabler v. Toledo Bridge Co., 11 O.C.D. 87, Circ. Ct. of Lucas County (1900).

Ashland v. Marks, 43 O.C.C. 428, 22 O.C.C. N.S. 21, Wayne County Ct. of Appeals (1913).

Ohio follows the analogous doctrine as to non-liability of a landlord for injuries to invitee of tenant from condition of premises even when there is a duty to repair.

Burdick v. Cheadle, 26 Oh. St. 393, 20 Am. Rep. 767 (1875).

In 1944 the *Burdick* case was re-examined and its principle reaffirmed:

Ripple v. Mahoning National Bank, 143 O.S. 614, 56 N.E. (2d) 289 (1944).

2. The decision applies instead Section 385 of the Restatement of Torts which assimilates the liability of a contractor erecting a structure on land to the liability

of a supplier of chattels under the doctrine of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696 (1916). In the absence of state decisions supporting the Section, the opinion frankly pioneers by conjecturing that Ohio law would follow an asserted "trend of modern authority."

Section 385 of the Restatement of Torts is found in the Appendix at page 724, footnote 30.

3. In resorting to Section 385 of the Restatement of Torts the Court applies it incorrectly in that here the structure was inspected and tested before acceptance and the owner changed operating conditions after acceptance.

4. This stretching of Ohio law beyond the decisions of the Ohio Supreme Court relies on dicta in intermediate Ohio courts as indication of a trend.

See opinion, Appendix 722-725.

White Sewing Machine Co. v. Feisel, 28 Oh. App. 152, 156, 162 N.E. 633, 634 (1927), Ct. of App. of Ohio, Lucas County.

Dow Drug Co. v. Nieman, 57 Oh. App. 190, 13 N.E. (2d) 130 (1936), Ct. of App. of Ohio, Hamilton County.

Gilbride v. Leffel & Co., 37 Ohio Law Abstract 457, 47 N.E. (2d) 1015 (1942), Ct. of App. of Ohio, Clark County.

5. In substantive law the decision is in direct conflict with prevailing law as indicated by decisions in the following courts:

(a) Sixth Circuit Court of Appeals, applying Ohio law and also applying Illinois law.

Ohio case—

Williams v. Edward Gillen Dock, Dredge & Const. Co., 258 F. 591, 6 C.C.A. (1919), Westenhaver, D.J.

Illinois case—

Salliotte v. King Bridge Co., 122 F. 378, 6 C.C.A. (1903), 65 L.R.A. 620, cert. den. 191 U.S. 569, 48 L.Ed. 306.

(b) Seventh Circuit Court of Appeals.

Galbraith v. Illinois Steel Co., 133 F. 485, 7 C.C.A. (1904), cert. den. 26 S.Ct. 759, 201 U.S. 643, 50 L.Ed. 902.

(c) Third Circuit Court of Appeals itself, prior to *Erie R. Co. v. Tompkins*, applying Pennsylvania law.

Fidelity Title & Trust Co. v. DuBois Electric Co., 218 F. 60 (1914), 238 F. 129 (1916), 253 F. 987 (1918).

(d) Supreme Court of the United States reviewing the decision of the Third Circuit Court of Appeals in the *DuBois* case just mentioned, which was reversed not on the principle involved but on its application to the facts.

Fidelity Title & Trust Co. v. DuBois Electric Co., 253 U.S. 212, 64 L. Ed. 865 (1920).

(e) Court of Appeals of District of Columbia.

Ford v. Sturgis, 14 F. (2d) 253, 56 App. D.C. 361, Ct. of App. D.C. (1926).

Geare v. Sturgis, 14 F. (2d) 256, Ct. of App. D.C. (1926).

(f) State courts generally.

Curtin v. Somerset, 140 Pa. 70, 21 A. 244, 12 A.L.R. 322 (1891).

Fitzmaurice v. Fabian, 147 Pa. 199, 23 A. 444 (1892).

First Presbyterian Congregation v. Smith, 163 Pa. 561, 30 A. 279 (1894).

Smith v. P.R.R. Co., 201 Pa. 131 (1902), 50 A. 829.

Stubbs v. Duquesne Light Co., 84 Pa. Super. 1 (1924).

Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457, 32 L.R.A. 837 (1896).

Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919).

Mayor of Albany v. Cunliff, 2 N.Y. 165, Ct. of App. N.Y. 1849 (leading case).

Losee v. Clute, 54 N.Y. 494, 10 Am. Rep. 638 (1873).

Howard v. Redden, 93 Conn. 604, 107 A. 509 (1919).

Christenson v. Bremer and New England Road Machinery Co., 263 Mass. 129, 160 N.E. 410 (1928).

Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L.N.S. 968.

(g) King's Bench.

Otto v. Bolton & Norris, (1936) 2 K.B. 46, 57.
Bottomley v. Bannister, (1932) 1 K.B. 458.

II.

The decision violates the Rules of Decision Act in refusing to follow the procedural law of Pennsylvania.

1. The decision conflicts with the applicable Pennsylvania law as to sufficiency of the evidence in personal injury cases that where all the evidence as to cause is circumstantial, indicating various possible causes, the burden is on the plaintiff to individuate the particular cause attributed to defendant and to exclude the other possible causes reasonably suggested by the evidence.

Alexander v. Pa. Water Co., 201 Pa. 252, 50 A. 991 (1902).

Gausman v. Pearson Co., 284 Pa. 348, 131 A. 247 (1925).

Pfendler v. Speer, 323 Pa. 443, 185 A. 618 (1936).

Brooks v. Morgan, 331 Pa. 235, 200 A. 81 (1938).

Burger v. Fischer Baking Co., 338 Pa. 110, 12 A. (2d) 14 (1940).

Henderson v. National Drug Co., 343 Pa. 601, 23 A. (2d) 743 (1942).

Fix v. Pa. Power & Light Co., 346 Pa. 598, 30 A. (2d) 114 (1943).

Ashby v. Philadelphia Transportation Co., 356 Pa. 610 (1947); 52 A. (2d) 578.

Stauffer v. Railway Express Agency, 355 Pa. 24 (1946), 47 A. (2d) 817.

Donaldson v. Pittsburgh Railways Co., 358 Pa. 33, 55 A. (2d) 759 (1947).

Stanalonis v. Branch Express Agency, 358 Pa. 426, 57 A. (2d) 866, March 22, 1948.

2. The decision conflicts with a recent decision in the Third Circuit Court of Appeals itself applying Pennsylvania law.

> *Nash v. Raun,* 149 F. (2d) 885, 3 C.C.A. (1945), cert. den. 66 S. Ct. 99, 326 U.S. 758, 90 L. Ed. 455.

3. The decision conflicts with general law expressed by the Federal courts before *Erie R. Co. v. Tompkins.*

> *P.R.R. Co. v. Chamberlain,* 288 U.S. 333, 77 L. Ed. 819 (1933), Sutherland.

III.

Inasmuch as the opinion expresses doubt about the clarity and meaning of the Pennsylvania rule as to sufficiency of evidence, further proceedings in the Federal court should be stayed pending final decision by the Pennsylvania courts in a sister case already tried and awaiting argument.

> *Hillsborough Township v. Cromwell,* 326 U.S. 620, 628, 90 L.Ed. 358, 365 (1946).

IV.

On principles of *stare decisis*—particularly where a Federal court is applying state law—the settled common law should not be modified in a case involving ruinous hardship. If changes in the law are to be made, the state courts should be allowed to make them and less onerous situations should be used as the vehicles of change.

V.

On interlocutory grounds the parties should not be put to the expense of a long retrial where the present record clearly presents the ultimate legal questions involved.

Conclusion.

For the foregoing reasons it is respectfully submitted that writ of certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. The Decision Fails to Apply the Substantive Law of Ohio and Proceeds to Misapply in Substitution Section 385 of the Restatement of Torts.

The decision of the Third Circuit Court of Appeals ignores the Ohio law—and prevailing law generally—which rules the case. It substitutes in lieu thereof Section 385 of the Restatement of Torts which is not supported by case law in Ohio or elsewhere.

The principle of Ohio law involved is that a contractor installing a structure on the land of another is not liable for personal injuries to third parties after the work is surrendered to the owner even if the contractor's work is defective. This doctrine, based essentially on absence of control by the contractor and the break in proximate causation, is announced in the following Ohio cases:

Bailey v. N. W. Ohio Natural Gas Co., 4 O.C.C. 471, Circ. Ct. Lucas County, affirmed without opinion by the Ohio Supreme Ct., 52 O.S. 623, 44 N.E. 1130 (1894). In this leading case defendant installed a gas system to heat steam boilers in an electric plant. An employee of the plant was injured immediately after completion, in an explosion. Defendant held not liable on the ground that no contractual duty was owed to plaintiff as a third party.

Strabler v. Toledo Bridge Co., 11 O.C.D. 87, Circ. Ct. of Lucas County (1900). Defendant contracted to build

a floor under a scaffold but failed to do so. Verdict was directed for defendant on authority of the *Bailey* case.

Ashland v. Marks, 43 O.C.C. 428, 22 O.C.C. N.S. 21, Wayne County Ct. of Appeals (1913). Defendant gas company installed heating apparatus in an opera house. An explosion occurred two days after completion. Held, no liability, citing *Bailey* case.

Burdick v. Cheadle, 26 Oh. St. 393, 20 Am. Rep. 767 (1875). This leading case announces the analogous principle of non-liability of a lessor for injuries to invitee of tenant even when there is a duty to repair. Defendant lessor had constructed unsafe fixtures in a storeroom, under agreement. Plaintiff invitee, injured by fall of fixtures, was denied recovery from lessor who owed him no duty and had no control of the premises.

This case was re-examined as late as 1944 in the case of *Ripple v. Mahoning National Bank,* 143 O.S. 614, 56 N.E. (2d) 289, and the principle was reaffirmed.

Counsel for petitioner has found no case in Ohio repudiating or modifying the doctrine of the foregoing cases and likewise has found no case in Ohio extending to contractors building structures on the land of another the liability placed by the doctrine of *MacPherson v. Buick Motor Co.* upon manufacturers of chattels. It is submitted that this failure to follow established Ohio law violates the Rules of Decision Act as interpreted in *Erie R. Co. v. Tompkins.*

The decision furthermore is inconsistent with the decision in the Sixth Circuit Court of Appeals applying the law of Ohio in a similar factual situation.

Williams v. Edward Gillen Dock, Dredge & Const. Co., 258 F. 591, 6 C.C.A. (1919). Defendant built a breakwater in Cleveland harbor but upon completion failed to leave a warning light upon it. Held there was no liability upon the contractor thereafter for the drowning of a seaman. The opinion by Judge Westenhaver clearly announces the doctrine of the *Bailey* case.

On a question of local law a Circuit Court of Appeals, in the manner practiced by the Supreme Court of the United States, should pay great deference to the views of judges of the lower Federal courts sitting in the locality "who are familiar with the intricacies and trends of local law and practice."

> *Hillsborough Township v. Cromwell*, 326 U.S. 620, 628, 90 L. Ed. 358, 365 (1946).

The Sixth Circuit Court of Appeals held to the same principle in applying the law of Illinois.

> *Salliotte v. King Bridge Co.*, 122 F. 378, 6 C.C.A. (1903), 65 L.R.A. 620, cert. den. 191 U.S. 569, 48 L. Ed. 306.

The Seventh Circuit Court of Appeals did likewise:

> *Galbraith v. Illinois Steel Co.*, 133 F. 485, 7 C.C.A. (1904), cert. den. 26 S. Ct. 759, 201 U.S. 643, 50 L. Ed. 902.

The present decision of the Third Circuit Court of Appeals is in conflict with its own decision in an earlier case which was reviewed by the Supreme Court of the United States. Although there was a reversal on the application of the law to the facts, the principle of non-liability in absence of control was maintained:

Fidelity Title & Trust Co. v. DuBois Electric Co., 218 F. 60 (1914), 238 F. 129 (1916), 253 F. 987 (1918),

253 U.S. 212, 64 L. Ed. 864 (1920). In this case the defendant strung a political banner on a cable across a highway, fastening one end to a chimney. Wind tore the cable loose and plaintiff was injured. The Supreme Court, while recognizing the principle of termination of liability, found evidence of continuing control.

The decision is inconsistent with clear rulings of the Court of Appeals of the District of Columbia:

Ford v. Sturgis, 14 F. (2d) 253, 56 App. D.C. 361, Ct. of App. D.C. (1926); *Geare v. Sturgis,* 14 F. (2d) 256, Ct. of App. D.C. (1926). The contractor and architect on a Washington theatre were exonerated from liability when the roof fell and injured plaintiff subsequent to completion of work.

The state courts generally follow the doctrine of non-liability of the contractor after completion of the work. A number of citations are given in the petition at page 17.

It is very significant that England follows the same doctrine refusing, after specific consideration of the question, to apply to contractors the liability placed upon manufacturers of chattels under the doctrine of *MacPherson v. Buick Motor Co.*:

Otto v. Bolton & Norris, (1936) 2 K.B. 46, 57. In this case defendants built a house and sold it to Miss Otto. The ceiling fell, damaging the structure and injuring Miss Otto's mother. The daughter was allowed recovery for property damage being in privity of contract, but recovery was denied to the mother. The Court discussed the *MacPherson* case and properly declared that under this doctrine there is a proximate relationship between the vendor manufacturer and the ultimate vendee because of lack of opportunity for inspection and test;

whereas on the installation of structures, with opportunity for inspection, there is a break in causal connection. The same distinction is discussed in *Travis v. Rochester Bridge Co., supra,* p. 17.

Bottomley v. Bannister, (1932) 1 K.B. 458. In this case the builder of a house installed a gas burner without a flue. He was held not liable for the death of occupants by gas poisoning.

The opinion in the present case altogether ignores the foregoing Ohio cases and the doctrine which they follow but applies in lieu thereof Section 385 of the Restatement of Torts which assimilates the liability of contractors erecting structures on land to the liability of manufacturers of chattels under the *MacPherson* doctrine. It adopts the Restatement as the law of Ohio by sidestepping existing law and finding as it were a gap in the Ohio case law although no gap exists. The opinion formulates Ohio law by rationalizing a series of three "steps" which must be taken to reach its result; by declaring that the *MacPherson* doctrine is part of the law of Ohio, that it applies to third parties as well as to purchasers, and, most importantly, that it applies to contractors installing structures as well as to manufacturers selling chattels. No case in point is cited but various cases are referred to as indication of "the trend of modern authority;" Appendix 722-725.

The merits of the Court's reasoning are not argued in this petition for writ of certiorari. Suffice it to observe the following: The Ohio cases are all in courts of intermediate jurisdiction, and in the case mainly relied upon, *Gilbride v. Leffel & Co.,** reference to the

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* 37 Ohio Law Abstract 457, 47 N.E. (2d) 1015 (1942), Ct. of App. of Ohio, Clark County.

MacPherson doctrine was dictum since judgment went to the defendant for absence of proximate cause. The Ohio cases are all clear chattel cases involving, respectively, an electric cord attachment, an explosive cigar and a marine boiler shipped by a manufacturer to an owner and returned to the manufacturer after the accident. The opinions make clear that Ohio continues to regard the *MacPherson* doctrine not as an independent doctrine but as an exception to the general rule of no liability where there is no privity of contract.

The cases from other jurisdictions cited in the opinion need not be answered at this time since the Federal court should follow the Ohio law.

In attempting to classify as a chattel under the Restatement huge gas tanks fabricated and welded in the field of heavy steel plates, the Court overlooks the Restatement's definition of a chattel:

> "A tangible movable thing is a chattel. This is the only use in which the word chattel is employed in the Restatement of this subject. * * * Any tangible movable thing * * *. The term chattel means any physical object which is capable of manual delivery and which is not the subject matter of real property." Restatement in the Courts, Permanent Edition, 1932-1944, Glossary, page 52.

An explanation of this decision may possibly be found in an article by Judge Goodrich in 27 American Bar Association Journal 547, January 1941, entitled, "Mr. Tompkins States the Law." Judge Goodrich in this article follows the *Tompkins* case to the point of saying that when a Federal judge finds a local decision it governs the case for him "and all he needs to do is apply it, but the surprising thing to discover is *how many gaps there are in the judge-made legal fabric in*

any state." (Emphasis supplied) He goes on to suggest that "the Restatement is sufficiently authoritative to bridge the gap." Can it be that this case afforded him an opportunity to apply this theory—at the expense of blacking out Ohio law?

Petitioners' contention is that there is no gap in the Ohio law and that this decision amounts to a return to *Swift v. Tyson.**

As stated in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477 (1941):

> "The proper function of the * * * federal court is to ascertain what the state law is, not what it ought to be."

As further stated in *West v. Amer. Tel. & Tel. Co.*, 311 U.S. 223, 85 L. Ed. 139 (1940):

> "True, as was intimated in the Erie R. Co. case the highest court of the state is the final arbiter of what is state law. When it has spoken its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. * * * It is the duty (of the federal court) in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from the prior decisions of the federal courts."

While nothing prohibits a Federal court from considering the admirable work of the American Law Insti-

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* 16 Pet. (41 U.S.) 1, 10 L. Ed. 865.

tute among the available data, it must not do so to the exclusion of the decided cases in the state courts. To do otherwise brings about the very lack of uniformity which *Erie R. Co. v. Tompkins* was intended to correct. As stated by Mr. Justice Frankfurter in *Angel v. Bullington,* 330 U.S. 183, 191, 91 L. Ed. 832, 838:

> "The essence of diversity jurisdiction is that a federal court enforces state law and state policy."

Section 385 of the Restatement of Torts Is Misapplied.

An additional error in the decision of the Third Circuit Court of Appeals is that it makes an erroneous application of the *MacPherson* doctrine to the facts of the present case. A reading of Cardozo's meaty opinion and the comment under Section 395 of the Restatement which asserts the *MacPherson* doctrine, shows that the doctrine is based on the likelihood that "the thing will be used by persons other than the purchaser and *used without new tests.* * * * We are dealing now with the liability of the manufacturer of the finished product who puts it on the market to be used without inspection by his customers." Under the facts of the present case the contractor cooperated with the Gas Company in the design, choice of materials and erection of the job and the Gas Company was advised throughout by engineering experts. The structure was thoroughly inspected and tested before using, was found satisfactory and was thereafter successfully used for over a year. Even if Section 385 of the Restatement should ever become law in its general principle, it should not be applied to a case where there is complete inspection and test by a technically-advised owner.

II. The Decision Departs from the Pennsylvania Rule on Burden of Proof and Sufficiency of Evidence Where the Evidence Is Circumstantial and There Are Various Possible Causes of an Accident.

The opinion of Judge Goodrich departs from a long and well understood line of Pennsylvania cases establishing the burden of proof and the sufficiency of evidence in personal injury cases where the evidence is all circumstantial. In the present case the actual cause of the accident remains unknown. An explosion was heard and a trembling was felt, and after the accident evidences of explosion and fire were visible in various places. No witness attempted to put his finger on the cause.

Under circumstances such as these, Pennsylvania applies prevailing law that a jury may not be allowed to base a verdict on conjecture. The plaintiff has the burden of singling out or individuating the cause attributed to the defendant and of precluding the possibility of injury in any other way. This principle is expressed in numerous Pennsylvania cases down to the present time and is constantly applied by the Pennsylvania courts. It was applied in this case by the District Judge, not long removed from an active trial practice in the Pennsylvania courts.

The Third Circuit Court of Appeals, however, says at App. page 728, in footnote 40:

> "It is difficult to get a clear harmonized pattern out of the numerous Pennsylvania cases on this point. In fact if one could select his cases and ignore those unfavorable to him, he could find authority which

has not been expressly overruled to support any of the following positions:"

There follows a statement of four varying positions and a conclusion that under any of them a Pennsylvania court would permit the case to go to a jury.

This footnote animadversion upon the Pennsylvania law is a departure from the Rules of Decision Act inasmuch as the Pennsylvania rule is well settled and in fact was applied by the Third Circuit Court of Appeals itself as late as 1945. If the Federal court cannot find a harmonized pattern in a long survey of the Pennsylvania cases, it should at least apply the recent pronouncements of the Supreme Court of Pennsylvania and it should not depart from its own previous application of the Pennsylvania rule.

Nash v. Raun, 149 F. (2d) 885, 3 C.C.A. (1945), Goodrich and McLaughlin, C.JJ., and Bard, D.J.; cert. den. 326 U.S. 758, 90 L. Ed. 455. This case involved an automobile collision without testimony of eye witnesses, each side having a different theory of cause based upon the position of the tire marks and the vehicles after the accident. The Court said, page 888:

> "Either theory is logical. Only a skilled physicist by using complicated formulae might explain what actually did happen. Evidence which tends to support two conflicting hypotheses tends to support neither and the circumstantial evidence, as presented, leaves the question of the defendant's speed in a conjectural vacuum. * * *
>
> "The circumstantial evidence presented in the present case is as consistent with the theory that the defendant was not negligent as it is with the

theory he was. If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponderance of its likelihood, Ott v. Boggs, 219 Pa. 614, 69 A. 61, and excluding other probabilities just as reasonable, Alexander v. Pennsylvania Water Co., 201 Pa. 252, 50 A. 991, the plaintiff should not be permitted to go to the jury. The circumstances must compel the conclusion that the defendant was negligent. Pfendler v. Speer, 323 Pa. 443, 185 A. 618. The jury may not be allowed to guess."

The last case in which the Supreme Court of Pennsylvania applied the principle is *Stanalonis v. Branch Motor Express Co.*, 358 Pa. 426, 57 A. (2d) 866, March 22, 1948. The rear wheels of a trailer ran over a man. Witnesses heard a thud but no one saw the impact. Judgment was for the defendant as a matter of law, the Court saying:

"The conclusion is, nevertheless, irresistible that appellee's negligence is not the only reasonable conclusion justified by the evidence and the verdict of the jury was based upon conjecture and surmise rather than facts established by the testimony.

"Affirmative proof of negligence by circumstantial evidence must be by evidence which precludes possibility of injury in any other way and is such that the only reasonable inference to be deduced therefrom is that the accident was caused by the negligence of the defendant in the manner alleged: Donaldson v. Pittsburgh Railways Co., 358 Pa. 33, 37, 55 A. 2d 759; Stauffer v. Railway Express Agency, Inc., 355 Pa. 24, 29, 47 A. 2d 817, 819. '* * * the evidence must so describe, picture or

visualize what actually happened as to enable one fixed with the responsibility for ascertaining the facts to find that defendant was the culpable party: Skrutski v. Cochran, 341 Pa. 289, 291, 19 A. 2d 106;' Balducci v. Cutler, 354 Pa. 436, 439, 47 A. 2d 643, 644. Conjecture and surmise are not substitutes for proof and a jury's verdict based thereon will be set aside: Stauffer v. Railway Express Agency, Inc., supra. Nor does the presumption that decedent was not negligent support an inference that defendant was negligent. Failure to rebut that presumption does not warrant an inference of negligence. Cf. Rowles v. Evanuik, 350 Pa. 64, 69, 38 A. 2d 255. Proof of the happening of an accident is not proof that one of the parties was negligent: Wenhold v. O'Dea, 338 Pa. 33, 35, 12 A. 2d 115; Sajatovich v. Traction Bus Co., 314 Pa. 569, 572, 172 A. 148.

"The evidence in the instant case does not 'so describe, picture or visualize what actually happened' as to enable a jury to find that appellee was negligent.

* * * * * * *

Certain it is that the evidence of circumstances prior and subsequent to the contact are not such as to satisfy reasonable and well-balanced minds that the accident resulted from the negligence of the defendant. See Rowles v. Evanuik, supra; Pfendler v. Speer, 323 Pa. 443, 185 A. 618; Reardon v. Smith, 298 Pa. 554, 148 A. 860. The record does not present a question of conflicting credibility. It presents only conflicting theories as regards the happening of the accident."

Another recent case in the Supreme Court of Pennsylvania announcing the principle is *Stauffer v. Railway Express Agency,* 355 Pa. 25 (1946), 47 A. (2d) 817. It was claimed that a boy was killed by being struck by a truck. There were no eye witnesses. The Court said at pages 25 and 29:

> "The rules prescribing the measure of proof required to establish negligence have been frequently stated; the difficulty is in their application. It is not enough to show merely that an accident occurred, or that it may have happened from any of several causes, equally probable, for only one of which the defendant would be responsible; a jury cannot be allowed to find a verdict on the basis of a mere guess or conjecture; there must be a description of the facts and circumstances sufficient to justify a reasonable conclusion that the defendant was negligent and thereby caused the accident. Among recent cases enunciating and applying these principles may be cited Skrutski v. Cochran, 341 Pa. 289, 19 A. 2d 106; Houston v. Republican Athletic Association, 343 Pa. 218, 22 A. 2d 715; Martin v. Marateck, 345 Pa. 103, 27 A. 2d 42; Fix v. Pennsylvania Power & Light Co., 346 Pa. 598, 31 A. 2d 114; Liguori, Admr. v. Philadelphia, 351 Pa. 494, 498, 41 A. 2d 563, 564. But, on the other hand, it is not necessary that there be testimony of eye-witnesses; circumstantial evidence may be amply sufficient to prove negligence: Pfendler v. Speer, 323 Pa. 443, 445, 185 A. 618, 619; Grimes v. Yellow Cab Co., 344 Pa. 298, 302, 25 A. 2d 294, 296; Giordano v. Clement Martin, Inc., 347 Pa. 61, 64, 31 A. 2d 504, 506; Rowles v. Evanuik, 350 Pa. 64, 68, 38 A. 2d 255, 257. As was said in Giordano v. Clement Martin, Inc., 347

Pa. 61, 64, 31 A. 2d 504, 506: 'Proofs to a degree of absolute certainty are rarely attainable; it is sufficient that they be such as to satisfy reasonable minds.' Nor does the law require the elimination of every possible cause of the accident other than that on which the plaintiff relies, or of all the causes which the ingenuity of counsel may suggest, but only of such other causes, if any, as are fairly suggested by the evidence: Giordano v. Clement Martin, Inc., 347 Pa. 61, 64, 31 A. 2d 504, 506; Saganowich v. Hachikian, 348 Pa., 313, 316, 35 A. 2d 343, 345; Dunmire v. Fitzgerald, 349 Pa. 511, 514, 37 A. 2d 596, 598; Jones v. Monroe Electric Co., 350 Pa. 539, 542, 39 A. 2d 569, 570, 571. * * *

"It is the burden of the plaintiff to produce evidence of circumstances 'so strong as to preclude the possibility of injury in any other way and provide as the *only* reasonable inference the conclusion' that the death was caused by the negligence of defendant in the manner alleged: Pfendler v. Speer, 323 Pa. 443, 448, 185 A. 618; Houston v. Republican Athletic Association et al., 343 Pa. 218, 220, 22 A. 2d 715".

The foregoing case was cited by the Supreme Court of Pennsylvania in 1947 in *Ashby v. Philadelphia Transportation Co.*, 356 Pa. 610, 52 A. (2d) 578. The principle was applied again in 1947 in *Donaldson v. Pittsburgh Railways Co.*, 358 Pa. 33, 55 A. (2d) 759.

Of the numerous Pennsylvania cases, the following may be cited:

Alexander v. Pa. Water Co., 201 Pa. 252, 50 A. 991 (1902).

Gausman v. Pearson Co., 284 Pa. 348, 131 A. 247 (1925).

Pfendler v. Speer, 323 Pa. 443, 185 A. 618 (1936).

Brooks v. Morgan, 331 Pa. 235, 200 A. 81 (1938).

Burger v. Fischer Baking Co., 338 Pa. 110, 12 A. (2d) 14 (1940).

Henderson v. National Drug Co., 343 Pa. 601, 23 A. (2d) 743 (1942).

Fix v. Pa. Power & Light Co., 346 Pa. 598, 30 A. (2d) 114 (1943).

The Supreme Court of the United States applied the same principle in *P.R.R. Co. v. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819 (1933). There the Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * * 'When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

The decision of the Third Circuit Court of Appeals conflicts with the foregoing cases and practically amounts to saying that all cases in Pennsylvania should go to the jury so long as a microscope can be focused

upon one cause attributable to a defendant. A reading of the Pennsylvania cases, including those mentioned in the relegated footnote, discloses that the Pennsylvania courts do not thus apply the rule.

It is submitted that the present decision loses sight of the burden of proof and the necessity of eliminating other possible causes. On the facts of the case the plaintiff failed to carry the burden of showing causal connection.

III. In View of the Federal Court's Interpretation of the Pennsylvania Law on Sufficiency of Evidence, Proceedings in This Case Should Be Stayed Until the Pennsylvania Courts Interpret the Law in a Pending Sister Case.

This is an appropriate case for applying the principle that where the Federal court is in doubt about the local law, "the proper procedure is for the Federal court to hold the case until a definite determination of the local law can be made by the state courts."* The opinion of Judge Goodrich frowns upon the Pennsylvania rule of "individuating" causes of injury in cases where all the evidence is circumstantial, relegates the discussion of the rule to a footnote and says it is "difficult to get a clear harmonized pattern" out of the numerous cases, in which he says in effect that authority can be found for almost anything.

If the Federal court can find no harmonized pattern in the cases stating the rule as to sufficiency of evidence,

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* *Hillsborough Township v. Cromwell,* 326 U.S. 620, 628, 90 L. Ed. 358, 365 (1946).

it is hard for counsel to understand what principle of law was applied by the Court to the facts in this case unless it was some kind of "general law."

There now exists, however, a rare opportunity for determining the Pennsylvania law of the case by reason of the pendency of the sister case just tried in the Court of Common Pleas of Allegheny County. Motions for new trial and for judgment notwithstanding the verdict are pending, raising the very point in issue about the sufficiency of the evidence of negligence to go to the jury, the proofs being practically the same in that case as in the present one. The losing party will undoubtedly appeal to the Supreme Court of Pennsylvania. A decision there will not only restate the Pennsylvania rule but apply it to the facts in issue.

If the District Court should retry this case before a decision is reached by the Supreme Court of Pennsylvania, there is the possibility of that very lack of uniformity which *Erie R. Co. v. Tompkins* was aimed to correct. The District Judge may be caught between Judge Goodrich's discussion of the Pennsylvania law in footnote 40 and a possible contrary decision by the Supreme Court of Pennsylvania. This situation would be similar to that in *Vandenbark v. Owens Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1941), in which state law was reversed pending final decision in the Federal court, requiring a concurring reversal by the Federal court.

Pending decision on this petition for writ of certiorari, the time does not appear to be ripe to petition the Circuit Court of Appeals or the District Court to stay the retrial. The Supreme Court of the United States

might appropriately grant this writ, and then postpone argument until the Supreme Court of Pennsylvania decides the sister case. In the alternative, the Supreme Court of the United States might hear argument in due course. It might thereupon dispose of the case altogether by determining both points in the case, that the contractor's liability had terminated under the law of Ohio, and that in any event the evidence of causal connection was insufficient to submit to the jury under the law of Pennsylvania.

IV. The Doctrine of Stare Decisis Requires the Federal Court to Follow the Ohio Law Particularly in a Situation of Ruinous Hardship.

Apart from *Erie R. Co. v. Tompkins,* the Federal court should be loath to disturb Ohio law in this case on sound principles of *stare decisis.* Where the law has been long established and business interests have acted in accordance with it, retrospective changes should be made with great caution. In this case a small steel fabricating company made a construction contract with a large gas company, finished the job and turned it over to the owner after a satisfactory test. The owner thereupon undertook the operation, filling the tanks with liquid. The contractor no longer had any control of the operation nor a right of entry into the plant. The owner could make such changes as it desired and the contractor, if to be held liable, was at the mercy of the owner. If the contractor had known in advance that it would be subjected to such risk of liability, it would have been in position either to decline the contract or else to attempt to obtain insurance.

In this case, however, the Court has determined that an accident occurring thirteen months after delivery of a structure may be charged to the contractor. Seventy-eight cases are pending involving millions of dollars, an overwhelming prospect for any defendant. This is no occasion in which to establish new law and fix *ex post facto* liability. Deviation from precedent under these circumstances would be unjust. If change must be made, let the courts use as a springboard for new doctrine a case which will not be so costly and let the state court make the shift. The Ohio courts should not consider this an appropriate case in which to change the law. *A fortiori* it does not lie within the functions of a Federal court applying Ohio law to depart from *stare decisis* and at the same time from *Erie R. Co. v. Tompkins.*

V. This Petition for Writ of Certiorari Is Not Interlocutory in Substance.

Although the judgment of the Circuit Court of Appeals merely remands for retrial, the facts of the case as now established sufficiently raise the ultimate legal questions. The fact of completion of the job by the contractor and its surrender to the full control of the owner is not disputed. Likewise it is not controverted that the exact cause of the accident is unknown and that there are a number of possible causes fairly suggested by the evidence. The trial of plaintiff's case alone in the District Court lasted five weeks and in the trial of the second case in the Court of Common Pleas of Allegheny County the presentation of both sides took six weeks. The Court and the parties should not be subjected to a retrial before consideration of the procedural phase of

the case by the Supreme Court of Pennsylvania and of the ultimate questions of law by the Supreme Court of the United States. The law of this whole series of cases will remain uncertain until the Supreme Court has spoken.

Respectfully submitted,

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JUN 4 19
CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 814.

PITTSBURGH-DES MOINES STEEL COMPANY,
a co-partnership,
JOHN E. JACKSON, and
PITTSBURGH-DES MOINES COMPANY,
a corporation,
Petitioners,

vs.

EILEEN MORAN,
Administratrix of the Estate of
Patrick J. Moran, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 814.

PITTSBURGH-DES MOINES STEEL COMPANY,
a co-partnership,
JOHN E. JACKSON, and
PITTSBURGH-DES MOINES COMPANY,
a corporation,
Petitioners,

vs.

EILEEN MORAN,
Administratrix of the Estate of
Patrick J. Moran, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

The only question before the Circuit Court of Appeals, in view of the fact that there was a directed verdict, was whether under the evidence in the Record, there was a question for the determination of the jury. The trial judge said **no**. The Circuit Court of Appeals said **yes**, and reversed and remanded for a new trial.

This primary question involves five subordinate questions. Four of them depend on substantive Ohio law; and one concerns the procedural law of Pennsylvania, viz:

I.

Under the law of Ohio, is a plant for the liquefaction of natural gas, and the storage of five thousand tons of the liquid gas in the middle of a large city, an "absolute nuisance," or what is sometimes termed a "nuisance *per se*"?

II.

If the answer to Question No. 1 is **yes**, are the builders of the tanks for the storage of such liquefied gas liable as the **creators** of such an "absolute nuisance" for harm caused by a rupture of one of the tanks, at a time when they are not in possession or control of the tanks?

III.

Regardless of the question of liability under I, and II, was there sufficient evidence in the record to show that the builders of the tanks (defendants below) were negligent in the design or construction of the storage tank which ruptured?

IV.

If the answer to Question No. III is **yes** was there also sufficient evidence in the record to show that under the procedural rules of Pennsylvania the negligence in construction and design of the storage tanks was the proximate cause of the rupture of the tanks?

V.

Assuming that the evidence proved that the storage tank No. 4 was negligently designed and constructed, and that it ruptured for that reason, does the law of Ohio authorize recovery on the part of those persons who are harmed, who were employees of the purchaser of the tank?

The Circuit Court of Appeals did *not* decide the first question; but *did* decide the second adversely to the contentions of this respondent.

The last three questions, it decided in favor of the contentions of this respondent, and therefore reversed the trial court, and remanded for a new trial.

COUNTER STATEMENT OF FACTS.

This was an action for damages for wrongful death. It was brought by the widow of one of the many men killed in the great East Ohio Gas fire of October 20th, 1944, in the City of Cleveland, Ohio.

It was brought against the builders of the storage tank (one of four such tanks) which ruptured and released about two thousand tons of liquefied natural gas, and produced a tremendous and catastrophic fire that devastated a large area in Cleveland.

The defendants designed and constructed the tank in which this liquefied gas was stored. They completed their construction work thirteen months before the day of the disaster, and turned over possession of it to The East Ohio Gas Company (frequently referred to in this brief as East Ohio) for whom it was built. They had been paid in full, and were out of possession.

Plaintiff claims a right of recovery from defendants upon either or both of two separate propositions.

(a) The plant for the storage of liquefied natural gas was (under the law of Ohio), an "absolute nuisance" or what is sometimes termed a "nuisance *per se*"; and the defendants as the creators of this absolute nuisance remained liable for all harm caused thereby (without the necessity of any proof of negligence) so long as the nuisance continued, and irrespective of the fact that they were out of possession.

(b) The defendants were negligent in the construction of the tank, in that it was so constructed, in design, in materials, and in workmanship, as to be imminently and inherently dangerous; and the disaster was the direct result of this negligence.

On the day of the disaster, October 20, 1944, East Ohio had in operation its plant for the Liquefaction, Storage, and Re-gasification of natural gas (frequently referred to as the L.S.R. plant).

It was the first, and the only plant of the kind, in the world.

The liquid gas, at a temperature of about 260 degrees below zero, Fahrenheit, was stored in four huge tanks.

On the afternoon of October 20th, 1944, the contents of the largest of these tanks (No. 4) were observed spurting out. Within two or three minutes the entire two thousand tons of liquid in that tank poured out. The liquid immediately emitted tremendous clouds of inflammable and explosive vapors. Great fires broke out, and in the vast conflagration that followed, Patrick J. Moran, one of the employees of East Ohio, was burned to death. He had nothing to do with the L.S.R. plant, but worked for East Ohio near by. He left a widow and several little children, on whose behalf this action was filed.

The City of Cleveland, Ohio, is a city of about one million people (44a).

Its gas supply comes from East Ohio, a public utility which sells natural gas throughout the entire city, both to private homes and to industrial users. It owns and operates a substation substantially in the center of Cleveland, known as its No. 2 Works (43a). This No. 2 Works consists of about ten acres of land which is surrounded by railroad lines, industrial plants, and private homes.

For some years, East Ohio has been troubled by the fact that in the bitter cold spells of winter, its gas supply has sometimes proved inadequate for several days at a time. In 1939, East Ohio became interested in a scheme for the storage of an immense reserve supply of natural gas by liquefying it, and then storing it in tanks which were in effect huge thermos bottles.

The basic difficulty in storing it arose from the fact that liquefied natural gas is an extremely cold fluid. Its temperature, depending on the varying amounts of methane and other gases, is between 250 and 260 degrees below zero, Fahrenheit. At this temperature, ordinary steel is extremely brittle, almost as brittle as glass (Exhibits 79, 82; 190a, 192a).

However, a small pilot plant was built in 1939 and operated for a few weeks.

The apparent success of this pilot plant was such as to cause East Ohio to decide to solve its problems by the erection of a liquefaction plant with some large tanks for the storage of the liquefied gas. This plant was built at its No. 2 works, in the center of Cleveland.

Generally speaking, the plant for the liquefaction, storage, and re-gasification of this natural gas involved the erection of a compressor building, a heat-exchanger, three large tanks for the storage of the liquid, and steam boilers to heat the liquid and regasify it when needed. The motors for compressing the various gases provided 4000 horsepower (167a).

The general process of liquefaction of the gas was by using what is known as the "cascade" system. Water was used to cool ammonia. Then cold ammonia was used to cool ethylene gas. And finally the cold ethylene gas was used to cool and help liquefy the natural gas (166a).

The natural gas, when it entered the plant, was compressed by the motors in the compressor house to about six hundred pounds per square inch (Exhibits 82, 83). This of course rendered it extremely hot. The heat of compression was taken out of it by water, and it was then chilled by contact with the cold ethylene to a temperature of —150° F. below zero. Then when the gas which was still at six hundred pounds pressure was permitted to expand to atmospheric pressure, it was chilled by this expansion so much further that a large part of it was immediately liquefied. This liquid was then run into

one of the storage tanks, and the portion which had not liquefied was run through the same cycle again (Exhibit 63, p. 10). Inasmuch as about 600 cubic feet of natural gas could be stored as one cubic foot of liquid, the economies of this type of storage are obvious. In this manner, about two and one half million cubic feet of natural gas could be liquefied in twenty-four hours. And since the three original tanks had a combined storage capacity of about one hundred and fifty million cubic feet of gas, the liquefaction plant, if running full time, could fill the three tanks in about two months.

As already stated, the general theory of the plan was that by having available such a supply of liquid gas, whenever an extremely cold spell should come along, the liquid could be run out, regasified by the heat from steam coils, and an immense additional amount of gas could thus be made available for the few days of the cold spell. Then when the cold spell was over, the reserve could be accumulated again (Exhibits 82, 83).

The original L.S.R. plant was finished late in the year of 1940 and the storage of liquefied gas began in February of 1941. It served its purposes so satisfactorily during the remainder of that winter that in the following year East Ohio decided to increase its storage capacity by building another—or fourth—storage tank.

Each of the three original tanks (commonly referred to as Nos. 1, 2, and 3) was in shape a huge round ball, 57 feet in diameter, and was designed to hold substantially fifty million cubic feet of natural gas, or a weight of liquid, when the gas had been liquefied, of about one thousand tons.

The proposal was to construct a fourth tank which would be twice as large as any one of the first three.

Accordingly East Ohio approached the defendants, as tank builders, and requested them to design such a tank.

In response to this request, the defendants prepared two alternative designs. One was for a spherical tank of the same general design as the first three, except that it would have the capacity for twice as much gas. The other was for a tank which is technically called a "toro-segmental" tank, but which was substantially cylindrical in form and has been referred to throughout the record in that manner.

The cylinder was considerably cheaper than the sphere, and therefore the defendants advised East Ohio to select the cylinder.

Accordingly the cylinder tank was built by the defendants. Its entire design, as well as all the specifications of materials, and the standards of workmanship were the responsibility of the defendants alone (52a).

The erection work began August 7, 1942 and was completed in the latter part of May of 1943. All of the fabrication of the steel plates, and the welding of the plates into the tank, as well as the choice of the steel alloy and the insulating materials was entrusted to the defendants.

Tank No. 4 was filled, for the first time, on November 5th, 1943, just eleven and one half months before the disaster.

Tank No. 4 and the three other tanks were used during the winter that followed, and they then stood dormant during the spring and summer of 1944. By reason of the insulation between the two walls—a three foot layer of insulation—the amount of evaporation even during the hot summer months was not very great. Indeed, it was estimated by defendants (Ex. 82, p. 39) that it would take about two years for all of the contents of one of the tanks to evaporate completely.

When the summer season was over, East Ohio on September 11, 1944 started up the L.S.R. plant and began the task of filling all of the four tanks. On October 20, 1944, and about 2:00 P. M. this was finished, and the

employees of East Ohio began the process of shutting down. This was a somewhat complicated procedure and required from an hour to an hour and a half or two hours for its completion (80a). The reason for this lay in the fact that under the necessary reversal of the "cascade system," the ammonia had to be pumped out of the system into the ammonia tanks, and the ethylene gas had to be pumped out of the system into its tanks (79a, 80a).

About 2:45 P. M. while the process of shut down was proceeding in the usual and normal manner, the walls of No. 4 tank (the big cylindrical tank) suddenly split open, streams of liquid and white vapor were seen to spurt out, and within two or three minutes (127a) the entire contents of two thousand tons of liquid gas poured out. Tremendous volumes of explosive vapors and gas were of course given off at once. Within a few minutes the vapors caught fire, and a hideous holocaust of destruction ensued in which a large area of Cleveland was destroyed, and a great many people were killed.

One of the men who was burned to death was plaintiff's decedent, Patrick J. Moran. At the time of the fire he was working for East Ohio, although he had nothing to do with the L.S.R. plant. He chanced to be working, that day, in the No. 2 Works, and was caught and engulfed in the sea of fire, and killed as were scores of others.

The plaintiff pleaded in her complaint that the defendants, in their design of the structure, and in their choice of materials, and in the workmanship used, had been guilty of negligence in a great many different respects. She offered an immense mass of evidence to support fourteen of these separate specifications, and the Circuit Court of Appeals found as a fact that there was evidence to support each one of them:

> "We at first thought some of them could be disregarded, but subsequent examination of the testimony shows there is some basis for each one."

1. The Use of a dangerous Cylindrical Form for Tank No. 4, instead of the relatively safer Spherical form.

There was evidence to establish that the cylindrical form was dangerous and caused stresses that were difficult to determine, and rendered rupture much more likely.

2. A Defective and Dangerous Design of the Safety Valve Assembly at the top of Tank No. 4.

The evidence indicated that this design caused one part of the top of the tank to be much warmer than other parts. This was due to the heat brought down by the metal connections to the outside air, and created immense strains at that "hot spot" in the inner shell. It was also established that the original rupture began at this very point, and was traced thence through other parts of the tank.

3. A Defective Design of the bottom of Tank No. 4 which failed to provide adequate ventilation for the bottom.

On this point, the evidence established that ice was constantly forming on the bottom of the steel tank, indicating inadequate ventilation.

4. A Defective Design of the lower part of Tank No. 4 in permitting the stresses to be dangerously high and without an adequate factor of safety.

The evidence showed that adequate design called for a factor of safety of not less than *four*. At one point, the actual design had a safety factor of a very small fraction more than *one*.

5. A Defective Design in failing to provide any means for keeping the liquid contents of No. 4 sufficiently stirred or mixed to avoid the hazard of dangerous "bumping" or superheating.

The evidence showed that at the temperature of —260° F. molecular motion is much reduced, and the haz-

ards of "bumping" or superheating, and consequent shock, are greatly increased; and that to avoid this mechanical stirring is needed.

6. The use of Rock Wool as insulating material for No. 4 tank.
7. The failure to use Cork as insulating material.

Cork was used as the insulation for the first three tanks. Rock wool was used in Tank No. 4, even though cork was specified, and although the evidence established that cork was available. As a result more than five hundred tons of rock wool was rammed into the insulating spaces where 185 tons of cork was specified; and this rock wool was perpetually settling, and caused inadequate, and uneven insulation, as proved by the frost which constantly formed on the sides of No. 4 tank.

8. The use of a dangerously brittle material (3½% Nickel Steel) for the construction of the inner shell of tank No. 4.
9. The failure to make any tests whatever of the impact strength, or brittleness, of the Nickel Steel used for the inner shell of No. 4 tank.
10. The failure to make separate tests of each of the seven heats of steel used in fabricating the inner shell of No. 4 tank.
11. The use of two particular heats of steel in the fabrication of the inner shell of No. 4 tank which were so brittle as to be utterly unfit for use.

The evidence showed that in their patents which they had taken out on the construction of tanks for the storage of liquefied gas, the defendants had emphasized the absolute necessity of having a steel which would remain tough, even at the temperature of —260° F. and that steel for such tanks must have a Charpy impact strength of at least 10 foot pounds.

The steel which was used in No. 4 tank was not tested by the defendants—nor by anybody else—before

the tank was built. After the disaster it was tested and was found to be much less tough and more brittle than the defendants in their patents had stated was essential.

And **two of the seven heats of steel which were used by the defendants in its construction were so brittle, that they had just about the same brittleness as plate glass.**

12. Inadequate standards or requirements with respect to the welding of tank No. 4.
13. Improper workmanship in the welding of tank No. 4.

The written requirements as to the standards of the welding were substantially different as between the first three spherical tanks, and the last No. 4 tank; and the difference was that the requirements were much relaxed when No. 4 tank was welded.

Furthermore, after the disaster had taken place, and the wreckage was examined by welding engineers, many indications of complete failure of weld, and proof of "conclusive and irrefutable evidence of poor workmanship" were found. (Ex. 59) Of twenty one specimens of welds tested by The Pittsburgh Testing Laboratory, defects were found in all but one specimen.

14. The failure to heed obvious warning signs of danger.

The defendants, at the time they turned the tank over to East Ohio knew that there was an unexplained "hot spot" at the center of the top of the tank (the very place where eventually the rupture of the tank began as proved by the engineer who traced the progress of the line of rupture).

They also knew that the insulation was failing, and causing ice spots on the outside of the tank; that masses of ice had formed on the bottom; that in the effort to maintain insulation, they had been compelled to jam five hundred tons of rock wool into the spaces designed to receive only 185 tons of cork.

QUESTION NO. I.

Under the law of Ohio, is a plant for the liquefaction of natural gas, and the storage of five thousand tons of the liquid gas in the middle of a large city, an "absolute nuisance," or what is sometimes termed a "nuisance per se"?

The Circuit Court of Appeals did not answer this question specifically, but indicated that the answer should probably be **Yes.**

QUESTION NO. II.

If the answer to Question No. I is YES, are the builders of the tank for the storage of such liquefied gas liable as the CREATORS of such an "absolute nuisance," for the harm caused by a rupture of one of the tanks at a time when they are not in possession or control of the tanks?

The Circuit Court of Appeals answered this question **no**; despite the contention of the plaintiff-respondent that under the Ohio decisions the storage of the liquefied gas was an "absolute nuisance" (*Taylor v. City of Cincinnati*, 143 Oh. St. 426; 55 N. E. 2d 724; 155 A. L. R. 44; 1944); and the further contention that under the law of Ohio, the creator of a nuisance continues liable for the nuisance, so long as it continues. (*Morris v. Woodburn*, 57 Oh. St. 330; 48 N. E. 1097; 1897; and *Shindelbeck v. Moon*, 32 Oh. St. 264, 30 A. R. 584.)

If certiorari should be granted, we would hope that this Court would regard it as appropriate to re-examine these two questions.

QUESTION NO. III.

Regardless of the question of the liability under I and II, was there sufficient evidence in the record to show that the builders of the tanks (defendants below) were negligent in the design or construction of the storage tank which ruptured?

On this point the defendants-petitioners made no serious attempt in the brief or in argument in the Circuit Court of Appeals to controvert the contentions of plaintiff-respondent as to the overwhelming proof of negligence in the various respects charged.

QUESTION NO. IV.

If the answer to Question No. III is YES, was there also sufficient evidence in the record to show that under the procedural rules of Pennsylvania the negligence in construction and design of the storage tanks was the proximate cause of the rupture of the tank?

Inasmuch as the case was filed and tried in the District Court for the Western District of Pennsylvania, the test as to the adequacy of the proof on the issue of proximate cause is claimed by the petitioners to be measured and determined under the state rule of Pennsylvania.

The Circuit Court of Appeals conceded that this was true, but pointed out that in the maze of Pennsylvania decisions it is difficult to be sure what is meant by the Pennsylvania rule that a plaintiff must "*individuate*" as to the cause of harm.

It pointed out that Pennsylvania decisions can be found which support any one of several possible theories of such "individuation"; but that the evidence in our record was such as to require a jury consideration under any one of these possible rules.

Without a long analysis of the Pennsylvania decisions, it is obvious from those cited by the petitioners

as well as the many others cited by the Circuit Court of Appeals that the Pennsylvania rule, despite the phrase in respect to "individuation," means only the conventional rule that a jury may not be permitted to "speculate" about causation when there is nothing in the record which warrants rational persons in coming to a definite view one way or the other. This is illustrated by *Straight v. Goodrich Co.*, 354 Pa. 391, 47 A. 2d 605 (1946). This was an action for damages for wrongful death. The decedent fell into an open elevator shaft, and a radiator fell also on top of him. No eye witness was available to establish how or why he fell.

Held: The issues of fact were for the jury.

> "Despite dicta to the contrary in some of our cases, it is not the rule that circumstantial evidence to establish negligence need exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the injuries or death (*Strobel v. Park*, 292 Pa. 200, 140 A. 827).
>
> Since proof to a degree of absolute certainty is rarely attainable, in any litigated factual controversy, the law requires only that the evidence as to the facts be enough to satisfy reasonable and well balanced minds that it was the one on which plaintiff relies." (Emphasis ours)

QUESTION NO. V.

Assuming that the evidence proved that the storage Tank No. 4 was negligently designed and constructed, and that it ruptured for that reason, does the law of Ohio authorize recovery on the part of those persons who are harmed, who were employees of the purchaser of the tank?

It is on this point, that petitioners principally seek certiorari.

Briefly stated, it is their contention that although Ohio follows the doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F 696

(1916) so far as it relates to *chattels,* it does not apply that doctrine to permanent *structures*; that in fact the Ohio law is specifically to the contrary; and that therefore when the Circuit Court of Appeals held that the same doctrine applies in Ohio to a structure like Tank No. 4 as if it were an automobile wheel, it was in error, and violated the rule laid down in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938).

To this claim, there are two answers.

1. The law of Ohio with respect to structures—so far as the *MacPherson* rule is concerned, is the same for structures as for chattels and is accurately stated in Sec. 385 of the *Restatement of the Law of Torts.*

2. Under recent decisions of the Ohio Supreme Court, huge structures like the Tank No. 4 are chattels.

1. The law of Ohio, with respect to structures—so far as the MacPherson rule is concerned is the same for structures as for chattels and is accurately stated in Sec. 385 of the Restatement of the Law of Torts.

In order to attempt to prove their point that the law of Ohio was misconceived by the Circuit Court of Appeals, the petitioners cite and rely principally on the old case of *Bailey v. Gas Co.,* 4 C. C. 471 (affirmed without opinion by the Ohio Supreme Court, 52 O. S. 623, 44 N. E. 1130).

There was nothing whatever in the record of that case which warranted the application of the *MacPherson* doctrine, even though the case was decided twenty two years before Judge Cardozo wrote his famous opinion.

But the interesting thing is that upon examination of the opinion, we find that the Circuit Court of Ohio after a rather complete analysis of the problem, gave express approval to the old New York case of *Devlin v. Smith,* 89 N. Y. 470 which was a case of harm caused by

a defective "structure." It cited with approval from the *Devlin* case, the following language:

> "The liability of the builder or manufacturer for such defect is, in general, only to the persons with whom he contracted. But, notwithstanding the rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is the natural and probable consequence of its use. * * *
>
> * * * * *
>
> (and with reference to the structure which collapsed—a scaffold)
>
> A stronger case, where misfortune to third persons, not parties to the contract, would be the natural and necessary consequence of the builder's negligence, can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life."

Then, after a further review of the Ohio cases, and some authorities from other states, the opinion in the *Bailey* case proceeds:

> "The rules of law that we gather from these, are substantially these: The owner of the property is holden to be liable to persons coming upon the property, if he keeps it in such a negligent condition that a person is injured by some negligent act of his. * * *
>
> A person is also liable who handles any dangerous compounds like poisons as we have seen in the *Guarnieri* case, **or erects a dangerous structure as in the Devlin case, supra.** * * *" (pp. 481-483.) (Emphasis ours.)

In other words, it turns out, upon examination, that the *Bailey* case is, in this dictum, squarely in accord with the decision of the Circuit Court of Appeals in our case at bar, rather than exactly to the contrary as claimed by the petitioners.

2. Under recent decisions of the Ohio Supreme Court huge structures, like Tank No. 4, are chattels.

There have been some recent and rather curious decisions of the Supreme Court of Ohio in the field of taxation that have dealt with this problem as to when a structure like Tank No. 4 is to be regarded as a "fixture" and when it is to be considered merely a "chattel" or "personalty."

In a series of cases decided on the same day (1945), towit, *Zangerle v. Oil Co.*, 144 Oh. St. 506, 60 N. E. 2d 52; *Oil Co. v. Zangerle*, 144 Oh. St. 523, 60 N. E. 2d 59; and *Zangerle v. Steel Corp.*, 144 Oh. St. 529, 60 N. E. 2d 170, the Supreme Court of Ohio held that large segments of an oil refinery are personalty; as is also a continuous steel strip mill which covered 21 acres, the "largest and fastest mill of its kind in the world." (p. 547)

With reference to the oil refinery, the dissenting opinion pointed out:

> "We have in question, among other items, steel structures rising high into the air and weighing many tons, which are held herein by the majority to be personal property. These structures are set on and bolted to specially designed and constructed concrete foundations, and are connected with other parts of the refinery by pipes or conduits some of which run over ground and others underground through tunnels. Unprotected from the weather by any housing and standing there as permanent rather than temporary edifices on land which has been devoted to oil-refinery purposes over a period of many years, these structures constitute an essential portion of a large refinery system."

Under the decisions referred to, it would appear that the storage tanks were clearly personal property, rather than fixtures; and there is therefore no reason to be concerned about the hypothetical distinction between the liability for negligent manufacture of chattels, and the

negligent construction of permanent structures which the petitioners are seeking to argue.

IN CONCLUSION.

In conclusion we submit that petitioners have shown no valid reason why certiorari should be granted in this case.

But if the Court should conclude that certiorari ought to be allowed, we trust the Court will include within its order a consideration of Questions I and II respecting the law of "absolute nuisance."

Respectfully submitted,

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